

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel.)	
W. A. DREW EDMONDSON, in his capacity as)	
ATTORNEY GENERAL OF THE STATE OF)	
OKLAHOMA and OKLAHOMA SECRETARY)	
OF THE ENVIRONMENT J. D. STRONG,)	
in his capacity as the TRUSTEE FOR NATURAL)	
RESOURCES FOR THE STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	05-CV-0329 GKF-PJC
)	
TYSON FOODS, INC., TYSON POULTRY, INC.,)	
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)	
AVIAGEN, INC., CAL-MAINE FOODS, INC.,)	
CAL-MAINE FARMS, INC., CARGILL, INC.,)	
CARGILL TURKEY PRODUCTION, LLC,)	
GEORGE'S, INC., GEORGE'S FARMS, INC.,)	
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)	
and WILLOW BROOK FOODS, INC.,)	
)	
Defendants.)	
)	
Defendants.)	

**DEFENDANT' PETERSON FARMS, INC.'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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**DEFENDANT' PETERSON FARMS, INC.'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Peterson Farms, Inc. ("Peterson") hereby submits its Response to *Plaintiffs' Motion for Partial Summary Judgment* (Dkt. #2062), addressing the Peterson-specific facts alleged in the Plaintiffs' Motion (Dkt. #2062) and further requesting the Court to deny Plaintiffs' Motion in its entirety. To avoid needless repetition of legal and factual positions, Peterson hereby incorporates in their entirety the arguments and facts set forth in briefs filed by the Tyson Defendants, to which Peterson will separately join, rather than duplicating those arguments and factual disputes herein. To the extent applicable, Peterson also hereby adopts and incorporates the facts and arguments set forth in the Briefs of Defendants Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc. and Simmons Foods, Inc.

I. RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

As noted, the foregoing facts are specific to Peterson, except where otherwise indicated. Where Peterson has referred the Court to "Tyson Disputed Facts," it is referring to the recitations in response to Plaintiffs' Statement of Facts contained in the corresponding numbered paragraphs in Dkt. #____, filed by Defendant Tyson Foods, Inc. and titled *Tyson Foods, Inc.'s Response to Plaintiffs' Motion for Summary Judgment (Dkt. No. 2062)*, to which Peterson will file a separate joinder. In response to all of Plaintiffs' factual contentions, however, Peterson adopts and incorporates by reference herein the Tyson Disputed Facts.

1. Admitted as to Peterson only.
2. Admitted.
3. Admitted.

4. **Disputed in part.** Dr. Canaday did not offer any documentation or substantive evidence of historical recreational use of the Illinois River or other streams in the IRW. Plaintiffs' reference to "the waters of the IRW" is overly broad, and the cited exhibits do not establish historical beneficial uses of all of such waters, referencing only the Illinois River, proper, and then only in part. The reference in Plaintiffs' Ex. 4 (Dkt. #2065-3) indicates that the majority of appropriations of water were for agricultural uses.

5. **Disputed in part.** Peterson objects in that the paragraph constitutes legal conclusions rather than facts requiring a response. To the extent it recites facts, the cited statutes speak for themselves. However, the State of Arkansas did not designate the IRW as a "nutrient surplus area watershed" until 2003, 2003 AR Laws 1061 (H.B. 1654), effective January 1, 2004, and Oklahoma did not enact Admin Code § 785:45-5-25 and issue Appendix A until May 15, 2006.

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[http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src= 75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00](http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00)

By changing the designation of the IRW from non-nutrient limited to nutrient limited, Oklahoma revised the upper limit for soil test phosphorus on poultry litter land applications in the Watershed from 400 STP to 300 STP. *See Ex. 1*, Oklahoma–Natural Resource Conservation Service, Conservation Practice Standard for Nutrients, Code 590, Tables 8 and 9 (March 2007). The Code 590 is the applicable standard adopted by the Oklahoma Legislature to govern the land application of poultry litter in the Oklahoma Poultry Feeding Operations Act, OKLA STAT. tit 2, § 10-9.7(D)(3).

6. **Disputed in part.** Peterson incorporates its Response to Fact No. 8, *infra*.

7. **Disputed in part.** Peterson admits that it *previously* owned the chickens in the custody of the independent poultry growers who contracted with it; that it supplied the feed and medication for the chickens; and that it processed and marketed the chicken products. However, Peterson denies that it controlled production of the chickens within the operations of the independent contract growers. Peterson supplied its contract growers with educational materials and guidance on best practices for raising poultry to enable its contract growers to be successful, and to produce healthy chickens as economically as appropriate; however, these independent poultry growers owned and managed their own operations and the means and methods for producing chickens for Peterson. Ex. 2, R. Wear Depo. at 18:6-19:6; Ex. 7, D. Henderson Depo. at 73:13—74:22.

8. **Disputed in part.** Peterson admits that its poultry business was vertically integrated until it sold its live production assets in June 2008; however, it disputes Plaintiffs' definition of "integrator." Referring to Peterson as an integrator means that the company owns the chicken from the inception of the egg through slaughter. Ex. 2, R. Wear Depo. at 22:15-22; *see also* Response to Fact No. 7, *supra*.

9. **Disputed in part.** Peterson admits that it had contracts with independent poultry growers in the IRW up until June 2008, and that said independent growers owned and operated poultry feeding operations in the IRW. Peterson Farms has never owned or operated poultry growing operations in the IRW. Ex. 2, R. Wear Depo. at 18:6-19:6; *see* Tyson Disputed Facts, ¶¶ 9, 9(a)-(l).

9(i). **Disputed in part.** Peterson no longer contracts with anyone in the IRW to raise birds. *See* Response to Fact No. 18, *infra*.

9(j). **Disputed in part.** The poultry production numbers listed for Peterson were revised and supplemented at least two times after Plaintiffs' Ex. 24 (Dkt. #2066) was compiled. For both those numbers in Plaintiffs' Ex. 24 (Dkt. #2066) and the subsequent supplements, Peterson qualified and objected to any use of the numbers by Plaintiffs for purposes such as use in their instant Motion. Ex. 3, Amended Fourth Supplemental Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents, Oct. 15, 2008.

10. **Disputed in part.** Peterson denies that it exercises control over all essential aspects of poultry production as noted in the subsections below.

10(a). Admitted as to Peterson.

10(b). Admitted as to Peterson.

10(c). Admitted as to Peterson.

10(d). Admitted as to Peterson.

10(e). Admitted as to Peterson.

10(f). **Disputed.** Plaintiffs have cited no evidence of the asserted fact from any Peterson source. Per the Peterson grower contract, Peterson paid incentives for growers to install higher efficiency equipment, such as tunnel ventilation, but such equipment was not a condition to the contract. Ex. 4 (filed under seal), Peterson Grower Contract, Bloomfield, at PFIWWP-085124-27. Peterson did not require a certain size of poultry house. Ex. 2, R. Wear Depo. at 26:6-24, nor did it specify the type of feeding or watering equipment required to contract. Ex. 2, R. Wear Depo. at 27:23-28:3.

10(g). **Disputed.** Peterson specifically denies that it supervised "the growing operations" of its independent contract poultry growers. Plaintiffs have not cited any evidence of the asserted facts from a Peterson source. The sole Peterson source cited was the testimony of

Ron Mullikin, a former employee. Mr. Mullikin testified that, to his knowledge, the Peterson service technicians visited the farms periodically to see if the birds were receiving proper care. *See* Plaintiffs' Ex. 35 (Dkt. #2070-2) at 47:23—48:5. However, live production was not within Mr. Mullikin's area of responsibility, and he acknowledged that he had no knowledge of "any specific ways the company exerted control over its growers under contract." Ex. 5, Mullikin Depo. at 69:17-20, 106:11-16. Peterson's 30(b)(6) witnesses explained that the role of its service technicians was to advise the growers on the care of chickens. Ex. 2, R. Wear Depo. at 32:15-18; Ex. 6, K. Houtchens Depo. at 5:12-15.

The relevant question in this case, however, is not whether Peterson controlled the raising of chickens by its independent contractors, but whether Peterson controlled the management and disposition of its independent contractors' poultry litter. The record is clear in this case that it did not. The growers have always owned their litter, and they were fiercely defensive of their right to control it. Ex. 5, Mullikin Depo at 107:12-17; Ex. 7, D. Henderson Depo at 20:6-16, 21:12-15; Ex. 2, R. Wear Depo. at 55:3-14. Peterson did not promote litter use as fertilizer, but if growers had suitable land and a need for the litter, many land applied it, while others chose to sell the litter to other farmers. Ex. 7, D. Henderson Depo at 22:8-23:3. Furthermore, the poultry growing contracts did not grant Peterson any right to control how poultry growers managed their farm fields. Ex. 7, D. Henderson Depo at 73:4-10. Peterson's growing contracts specified that the growers must obtain a Nutrient Management Plan and follow all applicable laws in dealing with their litter. Ex. 2, R. Wear Depo. at 55:15-19; Ex. 6, K. Houtchens Depo. at 44:19-45:8, 76:10-17, 79:1-10; Ex. 4 (filed under seal), Peterson Grower Contract, Bloomfield, at PFIRWP-085113, 85115, 85117; Ex. 8, Peterson Farms, Inc.'s Second Supplemental Response to Plaintiffs' March 2, 2007 Interrogatories, Oct. 15, 2008, Response to Interrogatory No. 1.

10(h). **Disputed.** Peterson no more dictated where its contract growers' farms are located than a property owner dictates where a roofing contractor he hires will locate its shop and office. It is purely a matter of practical economics. Peterson does not place or locate privately and independently owned poultry farms. Rather, to maintain the economics of poultry production, Peterson generally accepted offers to contract from growers whose operations were located within 50 miles of Peterson's feed mill in Decatur, Arkansas. Ex. 6, K. Houtchens Depo. at 29:18-30:18.

10(i). **Disputed.** Plaintiffs have cited no evidence of the asserted fact from any Peterson source. The record is to the contrary. Peterson did not dictate timing for its independent contract poultry growers to clean out their poultry houses. Ex. 6, K. Houtchens Depo. at 135:1-136:17

11. **Disputed.** Plaintiffs have cited no evidence of the asserted fact from any Peterson source. Peterson growing contracts were not generally flock-to-flock. *See, e.g., Ex. 4* (filed under seal), Peterson Grower Contract, Bloomfield, at PFIRWP-085110, 85115 (one year term); Ex. 9 (filed under seal), Peterson Grower Contract, Saunders, at PFIRWP-024029 (one year term).

12. **Disputed.** Plaintiffs' statement ignores the legal constraints set forth in the Packers and Stockyards Act, 7 U.S.C. § 181, *et seq.* and the Agricultural Fair Practices Act, 7 U.S.C. § 2302, *et seq.* that required Peterson to treat its contract growers with uniformity, during the time it had contract growers. Similarly, Plaintiffs ignore that each independent poultry grower who elected to contract with Peterson does so voluntarily. *See Tyson Disputed Facts*, ¶12.

13. **Disputed.** Plaintiffs' statement is an assertion of a legal conclusion, and not of fact. Plaintiffs' statement is also supported solely by the conclusion drawn by their retained expert. *See* Tyson Disputed Facts, ¶13.

14. **Disputed in part.** Plaintiffs' statement acknowledges that it does not apply to Peterson; however, in doing so it misstates the terms of Peterson's poultry growing contracts. The contract does not purport to transfer ownership of "poultry waste;" rather, it expressly acknowledges the growers' ownership of the litter and his right to use it or sell it and to retain all economic benefits therefrom. Ex. 4 (filed under seal), Peterson Grower Contract, Bloomfield, at PFIRWP-085113.

15. **Disputed.** Plaintiffs' statement is argumentative and unsupported by the cited materials. Plaintiffs' statement infers that growers do not desire to own and manage their poultry litter, and that it was foisted upon them as a matter of Peterson's growing contracts. Nothing could be further from the truth. The growers have always owned their litter, and they were fiercely defensive of their right to control it. Ex. 5, Mullikin Depo at 107:12-17; Ex. 7, D. Henderson Depo at 20:6-16; 21:12-15; Ex. 2, R. Wear Depo. at 55:3-14. Growers value litter, and it forms a strong economic incentive to entering the poultry growing business. Ex. 10, W.A. Saunders Depo. at 8:18-10:2, 29:3-23, 33:3-11. In addition, the growers provide the bedding material placed in their poultry houses. Ex. 4 (filed under seal), Peterson Grower Contract, Bloomfield, at PFIRWP-085112.

16. **Disputed.** Plaintiffs' statement is based upon a 1998 memo written by a former Peterson employee who served as Peterson's liaison with regard to discussions between the poultry companies and the City of Tulsa, and is presented by Plaintiffs out of context. As the author explained in his deposition, he was expressing his personal opinions that due to the

political climate and political pressures, liability for poultry litter management may one day be forced through such pressure onto the poultry companies, despite the fact that there was little science to support the conclusion. Ex. 5, R. Mullikin Depo. at 57:1-8.¹ Notably, Mr. Mullikin knew virtually nothing about operations or environmental conditions in the IRW, and his expression of personal opinion did not extend beyond the Eucha-Spavinaw Watershed and the City of Tulsa conflict. Ex. 5, R. Mullikin Depo. at 41:7-16, 64:17-65:4, 100:22-105:14. In fact, the designated 30(b)(6) representative for Peterson expressed Peterson's view that there was no scientific basis for Mr. Mullikin's personal opinions; and, furthermore, because Peterson required all of its contract growers to obtain and adhere to a Nutrient Management Plan, there would not be any over-application of litter and no pollution (and by implication no liability for anyone). Ex. 6, K. Houtchens Depo. at 79:1-10, 84:17-24, 105:21—106:8.

17. **Disputed.** Plaintiffs have cited no Peterson source in support of the asserted fact, and the cited materials do not support the legal conclusion Plaintiffs seek for the Court to draw therefrom. Peterson incorporates its Responses to Fact Nos. 7, 8, 10, 10(a)-(i). *See also* Tyson Disputed Facts, ¶17.

18. **Disputed.** Peterson does not have any poultry housed in the IRW. *See generally* Ex. 11 (filed under seal), Asset Purchase Agreement, July 16, 2008.

19. **Disputed.** The statement of fact is overly broad and vague. Plaintiffs' have not provided any definition of "a modern poultry house," and there is no dispute that poultry houses of numerous sizes, configurations, capacities and vintages owned by the independent poultry growers have been used for production in the IRW. To the extent that Plaintiffs' statement seeks

¹ Mr. Mullikin was not an officer of the corporation and was not authorized to bind Peterson either at his deposition or during his term of employment. Ex. 5, R. Mullikin Depo. at 100:1-16.

to set forth a rule of thumb that can be used to project production of poultry or litter, it lacks a sound foundation. *See* Tyson Disputed Facts, ¶19.

20. **Disputed.** *See* Tyson Disputed Facts, ¶20.

21. **Disputed.** Peterson does not have any poultry housed in the IRW. *See generally* Ex. 11 (filed under seal), Asset Purchase Agreement, July 16, 2008. Further, the statement as it applies to the locations of the poultry operations formerly under contract with Peterson is overly broad and vague. Similar to all of Plaintiffs' allegations, the cited exhibit makes no distinction between the Defendants and identified all putative farm locations in the same manner. Consequently, the exhibit offers no proof of any locations of any former growers who contracted with Peterson. *See also* Tyson Disputed Facts, ¶21.

22. **Disputed.** Peterson does not have any poultry housed in the IRW. *See generally* Ex. 11 (filed under seal), Asset Purchase Agreement, July 16, 2008. For flaws in Plaintiffs' estimates of poultry litter volumes, see Tyson Disputed Facts, ¶22.

23. **Disputed.** *See* Tyson Disputed Facts, ¶23.

24. **Disputed.** *See* Tyson Disputed Facts, ¶24.

25. **Disputed.** It is well-recognized that poultry growers value their litter for their operations for use as an effective fertilizer and soil amendment, or as a commodity that can be sold for additional revenue. The growers have always owned their litter, and if growers had suitable land and a need for the litter, many land apply it, while others chose to sell the litter to other farmers. Ex. 7, D. Henderson Depo at 20:6-16, 21:12-15, 22:8-23:3; Ex. 5, Mullikin Depo at 107:12-17; Ex. 2, R. Wear Depo. at 55:3-14. Growers value litter, and it forms a strong economic incentive to entering the poultry growing business. Ex. 10, W.A. Saunders Depo. at 8:18-10:2, 29:3-23, 33:3-11.

26. **Disputed in part.** Peterson admits that chicken manure contains phosphates, but denies that it contains elemental phosphorus. Peterson objects to the Plaintiffs' use of the term "significant amounts" as it is undefined, vague and overly broad. Peterson also objects to plaintiffs' citation to the *Poultry Water Quality Handbook*, as the quoted section contains statements beyond the scope of the putative disputed fact, and purports to interject additional statements that are in dispute. Moreover, the quoted text is cherry-picked from a collection of articles that omits other key discussions that contravene Plaintiffs' claims in this lawsuit. For example, the document states that:

"The poultry industry is committed to protecting water and air quality, the environment and natural resources." Ex. 12, PIGEON.0619.

"[P]roperly managed poultry wastes from manure, litter, dead birds, and wastewater are profitable farm investments. An effective waste management plan provides for the proper collection, storage, handling, and use of poultry waste. Products derived from wastes will reduce chemical fertilizer costs, improve soil quality, and protect water resources, air quality, and human and animal health." Ex. 12, PIGEON.0621.

"Pollution is Not Inevitable – Poultry growers, whether their operation is consolidated or diversified need not produce any pollution outside the system." Ex. 12, PIGEON.0629.

"Land application requirements generally establish when and where applications can be permitted; for example, only at approved rates, and with nutrient management planning; not on frozen ground or when rain is expected on slopes greater than 15 percent, or on setbacks from public buildings and property lines. Typical setback distances for land applications are 100 feet from streams or ponds, sinkholes, wells, and water supplies, and 150 feet from any water lines or known agricultural drains." Ex. 12, PIGEON.0633.

"Properly managing manure, controlling runoff, and nutrient management planning in conjunction with land applications will reduce or eliminate much of the proposed source of pollution and contribute to more productive farming." Ex. 12, PIGEON.0642.

"[T]he fact that poultry litter is high in nutrients is precisely its value. The nutrients in this resource make it an excellent soil conditioner and fertilizer. Growers can maximize the benefits of having this resource and help protect their

local water resources from high nutrient levels by planning and operating an effective nutrient management system.” Ex. 12, PIGEON.0644-45.

“Land application, especially field spreading, is in most cases the best use of poultry wastes. It recovers nutrients that would otherwise be lost, improves yield, and reduces the possibility of releasing this material to water and the environment. . . . Nutrient management planning as a preliminary to land application has become a standard practice for recovering and using the nutrients in solid and liquid animal waste.” Ex. 12, PIGEON.0665 (emphasis added).

27. **Disputed.** The paragraph contains an improper legal conclusion, and not a statement of fact. *See* Tyson Disputed Facts, ¶27.

28. **Disputed in part.** *See* Tyson Disputed Facts, ¶28. Peterson objects that the paragraph is overly broad and vague, and it suggests that Peterson was aware of the farm-specific disposition of its former contract growers’ litter. *See* Response to Fact Nos. 10(g), (i), 14, 15, and 25. Peterson also objects to the reference to argument by counsel not representing Peterson, as any such statement, even if binding on the represented party, which it is not, is not binding on Peterson.

29. **Disputed.** *See* Tyson Disputed Facts, ¶29; *see also* Ex. 13, E. Abernathy Depo. at 15:12-19, 37:16-23.

30. **Disputed.** Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. *See* Tyson Disputed Facts, ¶30.

31. **Disputed.** *See* Tyson Disputed Facts, ¶31.

32. **Disputed.** *See* Tyson Disputed Facts, ¶32 and Response to Fact No. 24, *supra*.

33. **Disputed.** Plaintiffs have not identified any location on the referenced exhibit where poultry litter was land applied by any poultry grower under contract with Peterson. Further, Peterson objects as the purported statement of fact and supporting documents draw no

distinction between poultry litter that was land applied by a Defendant or a grower under contract with a Defendant as opposed to the poultry litter that has been land applied by third-party purchasers and users of poultry litter who are not parties to the action, which renders this purported statement of fact irrelevant to any claim in the action. *See* Tyson Disputed Facts, ¶33.

34. **Disputed.** Peterson incorporates its Response to Fact Nos. 10(h), 18, 19, 20, 21 and 30. Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. *See* Tyson Disputed Facts, ¶34.

35. **Disputed in part.** Peterson admits that no-till poultry litter applications have occurred in the IRW. However, Plaintiffs’ purported statement is misleading and incomplete as it suggests that this practice in fact leads to offsite transport of phosphates from the application, which is contravened by experts and regulators in the nutrient management field, as well as Oklahoma’s own statutes and regulations that expressly allow no-till applications. Ex. 14, Declaration of Frank Coale, PhD. at ¶¶ 5(e), (f), (h), 7 and 9. Ex. 15, Q. Pham Depo. at 5:6-24, 27:1-9, 31:19—33:3, 62:16—63:23, 65:19—66:9; Ex. 1, Oklahoma–Natural Resource Conservation Service, Conservation Practice Standard for Nutrients, Code 590, at 5-1 (March 2007) (purpose of the Code is to minimize agricultural nonpoint source pollution of surface and groundwater resources); Ex. 16, Fisher Depo. at 157:13—158:9; Ex. 19, A. Lawrence Depo. at 14:9-22, 15:20—16:7, 19:12—20:5, 245:20—246:8.

The Code 590 is the applicable standard adopted by the Oklahoma Legislature to govern the land application of poultry litter in the Oklahoma Poultry Feeding Operations Act, OKLA. STAT. tit 2, § 10-9.7(D)(3). *See also* OAC § 35:17-5-1 (stating that the rules under the Oklahoma Registered Poultry Feeding Operations Act serve “to control nonpoint source runoff

and discharges from poultry waste land application of poultry feeding operations...[and] ensur[e] beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma).

36. **Disputed.** See Tyson Disputed Facts, ¶36; Ex. 14, Declaration of Frank Coale, Ph.D. at ¶¶ 3-4.

37. **Disputed.** See Tyson Disputed Facts, ¶37.

38. **Disputed.** See Tyson Disputed Facts, ¶38. Plaintiffs' purported fact directly contradicts Oklahoma's statutes and regulations governing the land application of poultry litter that permits application within the IRW on soils up to 300 STP. See Ex. 1, Oklahoma–Natural Resource Conservation Service, Conservation Practice Standard for Nutrients, Code 590, at Table 9 (March 2007) (purpose of the Code is to minimize agricultural nonpoint source pollution of surface and groundwater resources); Ex. 17, D. Parrish Depo. at 116:13—118:16; Ex. 18, F. Coale P.I. Testimony at 1766:6—1769:10; Ex. 19, A. Lawrence Depo. at 133-136, 137:1-2. Peterson also objects to the reference to the testimony of Mr. Mullikin as he is not qualified by education or experience to offer expert opinions in this matter. Ex. 5, Mullikin Depo. at 112:9-113:9. In fact, the designated 30(b)(6) representative for Peterson expressed Peterson's view that there was no scientific basis for Mr. Mullikin's personal opinions; and, furthermore, because Peterson required all of its contract growers to obtain and adhere to a Nutrient Management Plan, there would not be any over-application of litter and no pollution. Ex. 6, K. Houtchens Depo. at 79:1-10, 84:17-24, 105:21—106:8.

39. **Disputed.** Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. Peterson also objects to the reference to argument

by counsel not representing Peterson, as any such statement, even if binding on the represented party, which it is not, is not binding on Peterson. *See* Tyson Disputed Facts, ¶39.

40. **Disputed.** The cited discovery responses by Peterson do not establish the purported fact. Plaintiffs, in citing to Peterson's discovery responses, omit that the questions posed were objectionable, and in particular, sought to shift to Peterson the burden of proof they themselves bear. In fact, in response to Plaintiffs' March 17, 2009 Interrogatories No. 2, Peterson objected and stated that:

Peterson Farms also objects to this interrogatory as it assumes facts not in evidence, and presumes that "run-off or leaching" of "poultry waste", or some other substance, has occurred in the IRW. Peterson Farms further objects to this interrogatory as it contains a contention that improperly purports to shift the burden of proof from Plaintiffs to Peterson Farms on the issue of whether any "run-off or leaching" of "poultry waste" has occurred. Peterson Farms also objects to the interrogatory as misleading in that it suggests that the owner of the poultry houses where the "poultry waste" is initially situated, *i.e.*, the independent contract poultry grower, is the individual who makes the ultimate decision as to the location, amount and timing for every land application of such "poultry waste." Plaintiffs' interrogatory ignores that third persons within and without the IRW acquire title to "poultry waste" from the poultry growers, and make their own decisions about utilization of the "poultry waste" according to their own purposes. Subject to and without waiving the foregoing objections and the General Objections, Peterson Farms does not have knowledge of when poultry litter is applied within the IRW, where it is applied, how much is applied, or the STP for any location before its application.

Subject to and without waiving the foregoing objections and its General Objections, Peterson Farms is also not aware that any "poultry waste" land applied by any independent grower formerly under contract with it has resulted in any "run-off or leaching" in the IRW. Representatives of the State of Oklahoma, *see, e.g.*, depositions of Teena Gunter and Mike Thralls, have indicated that compliance with Nutrient Management Plans is compliance with Oklahoma law with regard to, among other things, run-off. ***Plaintiffs have not identified any poultry grower formerly under contract with Peterson Farms who has violated his or her Nutrient Management Plan; therefore, Peterson Farms is not aware of any evidence that any "run-off or leaching" has occurred in the IRW.***

Plaintiffs' Ex. 82 (emphasis added).

41. **Disputed.** Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. Peterson incorporates its Response to Fact Nos. 30-33 & 35-40. Because Plaintiffs continue to make reference to poultry litter applications without regard to whether such application was made by a Defendant or a grower under contract with a Defendant, as opposed to the third-party purchasers and users of poultry litter in the IRW, the purported fact is not relevant to any claim in this action. *See* Tyson Disputed Facts, ¶41.

42. **Disputed.** *See* Tyson Disputed Facts, ¶42.

43. **Disputed.** *See* Tyson Disputed Facts, ¶43.

44. **Disputed.** *See* Tyson Disputed Facts, ¶44. Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson and the cited references do not establish the purported fact against Peterson. Because Plaintiffs continue to make reference to poultry litter applications without regard to whether such application was made by a Defendant or a grower under contract with a Defendant, as opposed to the third-party purchasers and users of poultry litter in the IRW, the purported fact is not relevant to any claim in this action.

45. **Disputed.** *See* Tyson Disputed Facts, ¶45.

46. **Disputed.** *See* Tyson Disputed Facts, ¶46.

47. **Disputed.** Plaintiffs have not cited any evidence to establish the purported fact against Peterson, and states that statements purportedly made by others not authorized by Peterson are not binding against it. Plaintiffs' reference to the testimony of Ron Mullikin, a former employee of Peterson is misleading, and does not establish the purported fact against Peterson. Mr. Mullikin expressly stated throughout his deposition that he was unfamiliar with

operations and environmental conditions in the IRW, and that his expressions were only of his personal and non-expert opinions of contentions expressed by the City of Tulsa with regard to the Eucha-Spavinaw Watershed. Ex. 5, Mullikin Depo. at 41:7-16, 64:17-65:4, 100:22-105:14, 112:9-113:9.² Notwithstanding this, Mullikin's testimony does not even establish his own belief that poultry land application "presented a serious risk of potential environmental harm" to the Eucha-Spavinaw Watershed, much less the IRW. In fact, the designated 30(b)(6) representative for Peterson expressed Peterson's view that there was no scientific basis for Mr. Mullikin's personal opinions; and, furthermore, because Peterson required all of its contract growers to obtain and adhere to a Nutrient Management Plan, there would not be any over-application of litter and no pollution (and by implication no liability for anyone). Ex. 6, K. Houtchens Depo. at 79:1-10, 84:17-24, 105:21—106:8. Peterson further objects as Plaintiffs' cited references that purport to establish knowledge that the mismanagement of poultry litter can lead to contamination of waters as this does not establish the purported fact. Given that Plaintiffs have not cited to a single occurrence where a grower under contract with Peterson violated his/her Animal Waste Management Plan or Nutrient Management Plan, and the fact that such Plans are designed to protect water resources, *see* Response to Fact No. 35, Peterson reasonably relied on its contract growers undisputed compliance with such plans to eliminate any risk that litter applications by poultry growers under contract with it would cause any harm to waters in the Oklahoma portion of the IRW. *See* Tyson Disputed Facts, ¶47.

48. **Disputed.** *See* Tyson Disputed Facts, ¶48. Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. Because

² Mr. Mullikin was not an officer of the corporation and was not authorized to bind Peterson either at his deposition or during his term of employment. Ex. 5, R. Mullikin Depo. at 100:1-16.

Plaintiffs continue to make reference to poultry litter applications without regard to whether such application was made by a Defendant or a grower under contract with a Defendant, as opposed to the third-party purchasers and users of poultry litter in the IRW, the purported fact is not relevant to any claim in this action. With regard to plaintiff's reference to the memo regarding the Eucha-Spavinaw Watershed by former Peterson employee, Ron Mullikin, Peterson incorporates its Response to Fact Nos. 16 and 47.

49. **Disputed.** *See* Tyson Disputed Facts, ¶49.

50. **Disputed.** *See* Tyson Disputed Facts, ¶50.

51. **Disputed.** Plaintiffs have not identified any evidence to establish the purported fact against Peterson. Peterson denies that the cited testimony supports the purported fact; nonetheless, Dr. Ginn was not retained by Peterson, and his statements do not bind Peterson whatsoever. *See* Tyson Disputed Facts, ¶51.

52. **Disputed.** *See* Tyson Disputed Facts, ¶52.

53. **Disputed.** *See* Tyson Disputed Facts, ¶53. Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. Because Plaintiffs continue to make reference to poultry litter applications without regard to whether such application was made by a Defendant or a grower under contract with a Defendant, as opposed to the third-party purchasers and users of poultry litter in the IRW, the purported fact is not relevant to any claim in this action. *See also* Response to Fact Nos. 27-27, 30-33, 39, 42-46, 48-50.

54. **Disputed.** *See* Tyson Disputed Facts, ¶54. Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. Because

Plaintiffs continue to make reference to poultry litter applications without regard to whether such application was made by a Defendant or a grower under contract with a Defendant, as opposed to the third-party purchasers and users of poultry litter in the IRW, the purported fact is not relevant to any claim in this action. Peterson further incorporates its Response to Fact Nos. 22-26, 28, 30-33, 35, 39, 42-44, 46, 48-52.

55. **Disputed.** See Tyson Disputed Facts, ¶55. Plaintiffs have not identified any location where poultry litter was land applied by any poultry grower under contract with Peterson, and the cited references do not establish the purported fact against Peterson. Because Plaintiffs continue to make reference to poultry litter applications without regard to whether such application was made by a Defendant or a grower under contract with a Defendant, as opposed to the third-party purchasers and users of poultry litter in the IRW, the purported fact is not relevant to any claim in this action. Peterson incorporates its Response to Fact Nos. 5, 9, 10(h), 16, 18-26, 28, 30-39, 41-44, 46-52.

56. **Disputed.** See Tyson Disputed Facts, ¶56.

The aforementioned facts, whether alone or in conjunction with those cited in the other briefs incorporated and adopted herein, and the arguments in the latter demonstrate that Plaintiffs are not entitled to the relief sought in their *Motion for Partial Summary Judgment* (Dkt. #2062). Accordingly, Defendant Peterson Farms, Inc. respectfully requests the Court for an Order denying said Motion in its entirety.

II. ARGUMENT AND AUTHORITY

In order for Plaintiffs to be entitled to summary judgment against Peterson, they must demonstrate to the Court that “there is no genuine issues as to any material fact and that [they are] entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Plaintiffs have

not, and cannot accomplish this based on the evidence developed in this case. Foremost, Plaintiffs have the burden to establish a triable issue of causation with regard to Peterson, specifically linking Peterson to the injuries alleged in their Complaint. *See, e.g., In re Williams Sec. Litig.*, 558 F.3d 1130, 1136 (10th Cir. 2009). Of significant note, in establishing this link, Plaintiffs cannot rely on industry-wide or commodity-based “nonidentification” or collective liability theories to make their case against Peterson. *See Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512-13 (10th Cir. 1994) (finding Oklahoma would not adopt “alternative liability” theories); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (same).

In this case, a cursory review of Plaintiffs’ Statement of Facts reveals that Plaintiffs do not have any evidence linking either Peterson or anyone connected with Peterson to the injuries they alleged in their Complaint. Instead, Plaintiffs make page after page of general, argumentative statements, many of which cannot fairly be characterized as facts, which purport to demonstrate liability, but in fact amount to nothing more than a character assassination of the collective “poultry industry.” Indeed, in the hundreds of pages submitted to the Court in support of their Motion, Plaintiffs did not cite a single *undisputed material fact* that suggests, much less conclusively demonstrates for purposes of Rule 56(c), that Peterson has done anything unlawful or that has otherwise resulted in any injury to any resource in the IRW. Likewise, although Peterson denies any control over the activities of its former contract growers, Plaintiffs’ record is silent with regard to any action or conduct on the part of any former Peterson contract grower.

Furthermore, to the extent that Plaintiffs’ contend that the generalized prognostications of Mr. Mullikin are binding on Peterson, which it specifically denies, those statements nonetheless do not amount to undisputed material facts that entitle Plaintiffs to summary judgment against Peterson. The mere coincidence that Mr. Mullikin, through his own insight, foresaw a politically

motivated action like Plaintiffs' lawsuit does not entitle Plaintiffs to summary adjudication of their claims. As such, Plaintiffs cannot reasonably request the Court to enter summary judgment against Peterson on any of its claims when the record before the Court is void of any proof as to Peterson's purported liability. Accordingly, Peterson requests the Court to deny *Plaintiffs' Motion for Partial Summary Judgment* (Dkt. #2062) in its entirety.

Respectfully submitted,

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